STATE OF MICHIGAN

COURT OF APPEALS

ANTONIO WASHINGTON,

Plaintiff/Counter-Defendant-Appellant,

v

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellee,

and

CALVIN MCWILLIAMS,

Third-Party Defendant.

UNPUBLISHED
January 17, 2013

No. 305473
Wayne Circuit Court
LC No. 09-023446-CZ

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

In this breach of contract case, plaintiff/counter-defendant, Antonio Washington, appeals as of right the trial court's order granting summary disposition in favor of defendant/counter-plaintiff/third-party plaintiff, Allstate Property and Casualty Insurance Company (Allstate). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case stems from an insurance policy Allstate issued to Washington in December 2008. Defendant testified at his deposition that in April 2008 he purchased a residence located at 15430 Linnhurst in Detroit, intending to operate it as a rental property. After finishing the necessary repairs, Washington contacted Allstate in order to obtain insurance for the property. Washington called Allstate's "800" number and spoke with an Allstate employee regarding an insurance policy. Washington claims, and Allstate concedes for the purpose of its summary disposition motion, that Washington requested a landlord, or "rental dwelling," insurance policy. After completing the application process and receiving a quote over the phone, Washington purchased the insurance policy using his debit card.

Shortly thereafter, Allstate mailed Washington a copy of his insurance policy. Washington claims he read "the important stuff" in the policy, but did not read the entire policy. In fact, Washington's policy was a "homeowners policy."

In January 2009, Washington obtained a tenant for the property, Calvin McWilliams,[1] who occupied the residence until April 28, 2009. On April 28, 2009, the Linnhurst property suffered property damage as a result of an arson fire. During its investigation of Washington's property loss claims, Allstate learned for the first time that Washington was not residing at the insured premises, but rather, was operating it as a rental property. As a result, Allstate refused to pay Washington's claims under the insurance policy, which required Washington to reside at the insured property. Washington filed a complaint alleging breach of contract and failure to pay losses within 30 days of receipt of a claim.

Allstate moved for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact), arguing that, because Washington did not reside at the insured premises, his policy did not provide coverage for the loss. In response, Washington argued that there was a genuine issue of material facts regarding representations made by Allstate during the application process and that the doctrine of spoliation precluded summary disposition because Allstate possessed the tape-recorded application conversation during which Washington requested rental dwelling, not homeowners, insurance.

The trial court granted Allstate's motion, relying on *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155; 534 NW2d 502 (1995), in which the Michigan Supreme Court held that an insured who did not reside at the insured premises was unable to make a claim for losses under the homeowners policy, which clearly required the insured to reside in the home. The trial court denied Washington's motion for reconsideration and he now appeals as of right.

II. STANDARDS OF REVIEW

Although the trial court did not indicate whether it was granting Allstate's motion pursuant to MCR 2.116(C)(8) or (C)(10), it clearly considered deposition testimony in making its ruling. Therefore, we assume the trial court granted Allstate's motion for summary disposition under MCR 2.116(C)(10). This Court reviews decisions on motions for summary dispositions de novo. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition under MCR 2.116(C)(10) is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. In ruling on a motion submitted under this subrule, a court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*.

[1] Although referenced in the case caption, McWilliams is not a party to this appeal. Allstate filed a third-party complaint against McWilliams for the costs and expenses incurred in investigating McWilliams's fraudulent loss claim under his renter's insurance policy and obtained a default judgment against McWilliams on April 4, 2011.

Additionally, "the proper interpretation and application of an insurance policy is a question of law" that this Court reviews de novo. *City of Grosse Pointe Park v Michigan Muni Liab & Prop Pool*, 473 Mich 188, 196; 702 NW2d 106 (2005).

III. ANALYSIS

Washington argues that the trial court erred in granting Allstate's motion for summary disposition because the policy is ambiguous regarding whether Washington was required to reside at the premises. Washington also argues that, even assuming the language is unambiguous, he had no duty to read the contract and notify Allstate of the purported discrepancy in coverage because Allstate misrepresented the nature and extent of coverage provided. We disagree.

An insurance policy is, like any other contract, an agreement between two parties. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). The goal in the interpretation of a contract is to honor the intent of the parties, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003), the primary source of which is the language of the contract itself, *City of Grosse Pointe Park*, 473 Mich at 197-198. Thus, insurance policies are enforced according to their terms, and a court may not hold an insurer liable for a risk it did not assume. *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 35; 772 NW2d 801 (2009).

Washington claims that, given the language used in the policy, it is unreasonable to require him to discover the residency requirement and inform Allstate about the apparent discrepancy. Washington argues that, because the definition of "residential premises" does not state that the insured must reside at that location, and the term "reside" is not defined, the residency requirement is ambiguous.

An insurance contract is unambiguous if it fairly admits of only one interpretation. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 8; 792 NW2d 372 (2010). Where a term is not defined in the policy, it is accorded its commonly understood meaning. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004). "Clear and unambiguous language may not be rewritten under the guise of interpretation, and courts must be careful not to read an ambiguity into a policy where none exists[.]" *Dancey*, 288 Mich App at 8 (internal citations and quotations omitted).

A holistic reading of the definition section of the policy demonstrates that the policy unambiguously required the insured to reside at the insured premises. The policy defines "dwelling" as "the single family building structure identified as the *insured property* on the Policy Declarations, where *you* reside and which is principally used as a private residence." This definition states that the "dwelling" is the "insured property" where the insured resides. Moreover, the policy defines "insured premises" as "the residence premises[,]" and that term is defined as "the dwelling, other structures and land located at the address stated on the Policy Declarations." These definitional provisions are not susceptible to varying interpretations. In fact, in *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161 n 7; 534 NW2d 502 (1995), the Supreme Court rejected an argument that a policy with identical language was ambiguous, stating. "It is important to note at the outset that while other courts have concluded that similar

language is merely descriptive of the property covered by the policy, no court in the country has found this or similar language to be ambiguous. See also *McGrath v Allstate Ins Co*, 290 Mich App 434, 443; 802 NW2d 619 (2010). Had Washington read the policy, he would have known the policy required him to reside at the insured premises. Moreover, the absence of a definition of "reside," a common and ordinary term, is insufficient grounds for finding an ambiguity. *Morinelli v Provident Life & Acc Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000) ("The fact that a policy does not define a relevant term does not render the policy ambiguous.").

Washington alternatively argues that he had no duty to read the contract because Allstate misrepresented the terms of the policy by sending Washington the wrong policy. It is settled law that "[a]n insured is obligated to read the insurance policy and raise questions concerning coverage within a reasonable time after the issuance of the policy." *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 145; 314 NW2d 453 (1981). Even if an insured claims to have not read the policy, he nevertheless is held to having knowledge of its terms and conditions. *Auto Owners Ins Co v Zimmerman*, 162 Mich App 459, 461; 412 NW2d 925 (1987). An exception to this general rule exists when an insurer renews a policy but fails to notify the insured of a reduction in coverage. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 395; 729 NW2d 277 (2006).

The exception at issue in *Casey* is inapplicable here because Allstate *did* inform Washington of the purported "change" in coverage when it mailed Washington the policy for him to review. The cover page of the policy, which Washington testified that he read, stated it was a homeowners policy. Like in *Casey*, Washington was on notice that the policy was different from what he expected to receive from Allstate. "It was his business to know what his contract of insurance was . . . ." *Id.*, quoting *Cleaver v Traders' Ins Co*, 65 Mich 527, 532; 32 NW 660 (1887). Additionally, an insured's reasonable expectations do not control interpretation of an insurance contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). Situations in which "judges divine the parties' reasonable expectations and then rewrite the contract accordingly, [are] contrary to the bedrock principle of American contract law that parties are free to contract as they see fit" and, instead, courts must "enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Id.* See also *Ile v Foremost Ins Co*, ___ Mich ___; ___ NW2d ___ (Docket No. 143627, decided December 20, 2012) ("We have expressly rejected the notion that the perceived expectations of a party may override the clear language of a contract.") Washington's perceived expectations may not override the clear language of a contract.

We reject Washington's claim that a "special relationship" existed between Allstate's agent and Washington, which relieved Washington of his obligation to read the contract. Washington is correct that a special relationship may arise between the insurer's agent and an insured. *Harts v Farmers Ins Exch*, 461 Mich 1; 597 NW2d 47 (1999). However, Washington focuses solely on the agent's alleged misrepresentation of the nature or extent of the coverage offered or provided. Even assuming that Washington requested a rental dwelling policy during his application process, this does not show that Allstate misrepresented the nature of the policy. Washington provided no evidence regarding an extended interaction between the insurer's agent and himself in which the agent counseled him on the nature and extent of coverage. In addition, regardless of what was said during the application process, Washington cannot show Allstate

misrepresented the policy coverage because Allstate sent Washington the policy (which stated unambiguously that he was required to reside in the insured premises) for him to review.

For this same reason, we reject Washington's additional argument that Allstate is equitably estopped from relying on the policy to deny Washington's claim. "Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 141; 602 NW2d 390 (1999). To the extent that Washington's claim is premised on Allstate's agent's failure to inform Washington during the application process that it was a homeowners policy, silence or omissions form the basis of an equitable estoppel claim only when the silent party has a duty to speak. *Id.* As indicated above, Washington cannot show that a special relationship giving rise to such a duty arose. Furthermore, any reliance on Washington's part was not justifiable because Allstate provided the policy to him for him to review and he affirmatively chose not to read the policy to ensure its accuracy.

Finally, Washington contends that the trial court erred in relying on *Heniser* to grant Allstate's motion for summary disposition. We disagree. In *Heniser*, the Supreme Court considered a situation in which an insured resided at the insured premises for a period of time but ceased living there after selling the property on a land contract. *Heniser*, 449 Mich at 157. At the time of the sale, the property was insured under a homeowners policy that, as here, required the insured to reside at the insured premises. *Id.* Shortly after the sale, while the premises were still subject to the insurance policy, a fire occurred at the premises and the insured filed a loss claim, which the insurer denied. *Id.* On appeal to the Supreme Court, the insured argued, as here, that the policy was ambiguous regarding the residency requirement. *Id.* at 160. The Supreme Court disagreed and held, "The policy in this case, read as a whole, is unambiguous and does not cover the loss because the property was not a 'residence premises' at the time of the loss." *Id.* at 161. Thus, to the extent that Washington claims the policy language is ambiguous and is an issue for the jury, the trial court correctly relied on *Heniser* to conclude that the unambiguous language of the policy required the insured to reside at the premises in order to establish policy coverage. Even though *Heniser* did not involve a misrepresentation or equitable estoppel claim, as shown above, those claims are without merit here because Allstate sent Washington the policy for him to review and he failed to review it. The trial court did not err in granting Allstate's motion for summary disposition.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering